Supreme Court, U.S.
FILED

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No._____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1997

GATLIN GLADNEY GILDER A/K/A/ GATLIN GLADNEY GILDER, JR. A/K/A/ GATLIN GLADNEY GILDER, ET AL **Petitioner,**

v.

STATE OF MISSISSIPPI, **Respondent,**

Consolidated With No. 96-KA-00131 COA

On Petition for Writ of Certiorari to
The Supreme Court of Mississippi

PETITION FOR WRIT OF CERTIORARI

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50 pp

QUESTIONS PRESENTED

1. Is the State Court of Appeals required to make a proportionality analysis at all pursuant to the Eighth Amendment to the United States Constitution by and through the Fourteenth Amendment to the United States Constitution when the sentence imposed is within the "limits prescribed by statute"?

2. Whether the Mississippi Court of Appeals applied the proper standard to determine the impartiality of the judge sitting as trier of fact as well as trier of law who disclosed that he co-authored the statute amendment and felt like the crime charged was worse than murder and who also sat as judge during a plea by this defendant on exactly the same facts used for convicting the defendant in this second trial violated the due process rights of the defendant?

3. Did the Court of Appeals err in finding that double jeopardy did not bar the second prosecution as jeopardy had not attached in a plea situation when the Circuits differ as to attachment and this Court has not definitely spoken on the issue?

4. Did the Mississippi Court of appeals fail to apply a proper standard for same offense in a double jeopardy setting?

PARTIES TO THE PROCEEDING

The caption of the case contains the names of all the parties of the proceeding. There is no parent or subsidiary company to be listed pursuant to S.Ct. R. 29.6.

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PETITION FOR WRIT OF CERTIORARI

Gatlin Gilder, Jr. respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Mississippi in this case.

OPINIONS BELOW

The opinion of the Mississippi Court of Appeals is not reported and was rendered on November 4, 1997. (App.1) The opinions of the Circuit Court of DeSoto County were rendered on September 11, 1995, January 24, 1996, January 26, 1996, February 6, 1996, and March 19, 1996, *Nunc Pro Tunc* January 26, 1996, and were not reported. (App. 9, 11, 13,16, and 20 respectively).

JURISDICTION

The Court of Appeals for Mississippi entered its opinion on November 4, 1997, a petition for rehearing was denied on December 19, 1997. (App.23) and a petition for writ of certiorari was denied by the State Supreme Court on April 8, 1997. (App. 25). An application for extension of time within which to file the petition for certiorari was presented to Justice Scalia, who, on July 1, 1998 extended the time to and including September 4, 1998. Jurisdiction of the Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED

1. The Fifth Amendment to the United States Constitution provides in part: "....nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb;....nor be deprived of life, liberty or property, without due process of law.

2. The Eighth Amendment to the United States Constitution provides in part: "nor cruel and unusual punishments inflicted".

3. The Fourteenth Amendment to the United States Constitution, Section 1, provides, in part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of the law...".

4. Section 97-3-95 of Mississippi Code Annotated provides as follows:

> "(1) A person is guilty of sexual battery if he or she engages in sexual penetration with:
>
> (a) Another person without his or her consent;
>
> (b) A mentally defective, mentally incapacitated or physically helpless person; or
>
> (c) A child under the age of fourteen (14) years.

(2) A person is guilty of sexual battery if he or she engages in sexual penetration with a child of fourteen (14) but less than eighteen (18) years if the person is in a position of trust or authority over the child including without limitation the child's teacher, counselor, physician, psychiatrist, psychologist, minister, priest, physical therapist, chiropractor, legal guardian, parent, stepparent, aunt, uncle, scout leader or coach."

STATEMENT OF FACTS

In docket No. CR 95-84 R(D), the appellant, Gatlin Gilder, Jr., was indicted on 12 counts of fondling in a position of trust pursuant to M.C.A. §97-5-23(2) on March 2, 1995. The appellant was charged in each count with "putting his penis and his tongue into the vagina of" the victim over a 12 month period with a count for each month. The parties engaged in plea negotiations in which the appellant and the assistant district attorney reached a plea agreement in which for a plea of guilty to 4 counts of fondling the other eight charges would be dismissed.

The appellant entered his plea of guilty and petitioned the Court to accept his plea of guilty by filing same with the Court. At the hearing on the plea, the appellant admitted his guilt through the admission of sufficient facts to justify the plea and responded to all questions showing that his waiver was voluntarily and intelligently made. Prior to the Court's acceptance of the plea, the assistant district attorney moved to stop the plea; and the Court stopped the proceedings on

the request of the State. The appellant did not acquiesce to the order remanding the charges on September 11, 1995.

On September 28, 1995, the Grand Jury returned an indictment, No. 95-30-6 R(D), for 12 counts of sexual battery alleging identical facts on each count of the indictment as in counts 1 through 12 of the indictment in 95-84 R(D). Appellant filed a Motion to Dismiss on the basis of double jeopardy on or about December 29, 1995. The Court denied the Motion.

The Defendant appeared for a bench trial before the same judge in docket no. 95-306 R(D) before which he appeared and entered his plea of guilty in docket no. 95-84 R(D) during which he responded to questions showing the plea was knowing and voluntary and admitting all facts necessary for a finding of fact of guilt in the first indictment as well as the indictment no. 95-306 R(D). After the state put on its proof in a cursory form, the defendant stipulated to the facts but not the charge. Judge Ready, who sat as the plea judge, then returned a verdict of guilty against the appellant.

Judge Ready then sentenced the appellant to 30 years on Count I, 30 years on Count II, and 10 years suspended on Counts III through XII each. During sentencing and the return of the verdict, Judge Ready stated that he was one of the new authors of Section 2 of §97-3-95 of Mississippi Code Annotated and thought this was the worst sort of crime even worse than murder. Judge Ready then in his supplemental sentencing took every asset which the appellant owned or would ever own, except his National Guard retirement which would revert to appellant after his release from jail, and awarded them to the victim. Judge Ready also

stated that since the defendant would have the ability to be paroled at age 73 (20 years) that he expressed that it was his wish that he not be eligible for parole until he was 73 years of age in case the law changed during that 20 years. Further, Judge Ready acknowledged that it was a defacto life sentence by stating "if you get out".

Fondling in Mississippi for a person in a position of trust (stepparent) has a term of incarceration of not more than 10 years the same as for a person not in a position of trust. M.C.A. §95-5-23. Carnal knowledge of an unmarried stepdaughter under 18 has a term of incarceration of not more than 10 years. M.C.A. §95-5-41. Sexual battery which includes a person in a position of trust for children over 14 but under 18 has a term of incarceration of not more than 30 years. M.C.A. §97-3-95. This statute also criminalizes penetration of a child under 14 years of age, (what used to be capital rape), as well as forcible rape.

The appellant raised the issues of proportionality pursuant to the 8th Amendment of the United States Constitution and impartiality in violation of due process as guaranteed by the 5th Amendment to the United States Constitution on appeal. The case was assigned to the Mississippi Court of Appeals which ruled on, affirming the conviction and sentence. The judge writing for the Court of Appeals found there was no double jeopardy violation, no violation of partiality, and no violation of bias.

REASONS FOR GRANTING PETITION

That the Mississippi Court of Appeals did not apply any proportionality analysis in the case below nor would the 6th Circuit Court of Appeals; however, the 5th and 8th

Circuit Court of Appeals employ a limited proportionality analysis to determine if the sentence imposed is grossly disproportionate to the gravity of the offense.

That the Mississippi Court of Appeals applied a partiality analysis in which the judge was presumed impartial and the appellant was required to rebut that presumption under a test different from that use in a due process analysis. The 8th Circuit Court of Appeals applies a presumption but uses the due process analysis. The 5th and 6th Circuits use the due process analysis without any mention of the presumption.

This Court has never clearly decided when jeopardy attaches in a plea setting. The 5th, 6th, 8th and 9th Circuits apply acceptance of the plea as the time of attachment while the 10th Circuit applies sentencing and entry of judgment as the time of attachment. The 6th Circuit has also looked to state procedural law to determine when attachment occurs under state law.

The Mississippi Court of Appeals misapplied the same elements test for determination of the same offense for double jeopardy purposes.

ISSUE I

Is the State Court of Appeals required to make any proportionality analysis at all pursuant to the Eighth amendment to the United States Constitution by and through the Fourteenth Amendment to the United States Constitution when the sentence is within the "limits prescribed by statute".

Holding:

[State]
"The Supreme Court has stated that 'sentencing is within the complete discretion of the trial court and not subject to appellate review if it is within the limits prescribed by statute'. Hoops v. State, 681 So.2d 521, 537 (Mis. 1996)... This was within the statutory limits and should not be disturbed on appeal. Accordingly, we find that the trial judge was well within his discretion and that Gilder's constitutional rights were not violated."

The Mississippi Court of Appeals has held that no proportionality analysis is required at all if the sentence imposed is within the statutory guidelines. Order of Appellate Court citing *Hoops v. State*, at 537. (*Hoops* held that sentencing is not subject to appellate review as quoted by the court of appeals but that a limited review of proportionality is warranted under the 5th Circuit approach.)

The 6th Circuit Court of Appeals has somewhat similarly held that no proportionality analysis whatsoever is required unless the sentence imposed is death or life imprisonment without possibility of parol. *U.S. v. Thomas*, 49 F. 3d 253, 261 (6th Cir. 1995) citing *Solem v. Helm*, 463 U.S. 277, 103 S.Ct. 3001, 771. Ed. 2d 637 (1983); *Rummel v. Estelle*, 445 U.S. 263, 100 S. Ct. 11333, 63 L.Ed.2d 282 (1980); relying mainly on *United States v. Dumas*, 934 F.2d 1387 (6th Cir. 1990).

The 5th and 8th Circuit Court of Appeals requires a limited analysis of proportionality under the first prong of the *Solem* test to determine if there is gross disproportionality, and if and only if the Court infers gross disproportionality does the Court examine the last two elements of *Solem*.

McGruder v. Packett, 954 F.2d 313 (5th Cir. 1992); *U.S. v. Prior*, 107 F.3d 654, 660 (8th Cir. 1997). The 5th Circuit Court of appeals has used the fact situation in *Rummel* as a litmus test for disproportionality and have further applied two of its other decisions as further litmus tests. (*McGruder* Id and *Duhr* and unrefuted decision). *U.S. v. Gonzales*, 121 F.3d 928, 943-4 (5th Cir. 1997); see also *Smallwood v. Johnson*, 73 F.3d 1343, 1346-7 (5th Cir. 1996). The 8th Circuit has used *Harmelin* as a comparison in determining gross disproportionately without setting a litmus test. *U.S. v. Frieberger*, 28 F.3d 916, 920 (8th Cir. 1994).

All of the Circuit Court of Appeals referred to herein recognize the most recent and controlling Supreme Court authorities as *Rummell v. Estelle*, 445 U.S. 263, 100 S.Ct. 1133, 631 L.Ed. 282 (1980); *Solem v. Helm*, 463 U.S. 277, 103 S.Ct. 3001, N.L.Ed 2d 637 (1983); and *Harmelin v. Michigan*, 501 U.S. 957, 111 S.Ct. 2680, 115 L. Ed. 2d 836, (1991). The Mississippi Court of Appeals in this case did not recognize any U.S. Supreme Court authority relevant to the issue of proportionality.

The Petition for Writ of Certiorari should be granted if solely for the reason that this decision does no review of proportionality at all and the Circuits cited herein are all applying the authority differently. Much of the confusion appears to stem from the plurality opinion in *Harmelin* in which this Court was divided when two justices advocated abolishing the *Solem* analysis, three justices advocated modifying *Solem* to require an initial finding of grossly disproportionate before the last two prongs of the test, and four justices advocated retention of *Solem* in tact.

Further and in addition to differing decisions in the

Circuits, the decision of the Mississippi Court of Appeals in making no analysis of proportionality is in direct conflict with the decision of this Court to the extent the matter has been settled by this Court.

ISSUE II

Whether the Mississippi Court of Appeals applied the proper standard to determine the impartiality of the judge sitting as trier of fact as well as trier of law who disclosed that he co-authored the statute amendment and felt like the charged crime was worse than murder and who also sat as judge during a plea by this defendant on exactly the same facts used for convicting the defendant in this second trial violated the due process rights of the Defendant.

Holding.....

"This Court presumes that a judge is "qualified and unbiased". Brown v. State, 635 So.2d 851, 853 (Miss. 1994). In order to overcome the presumption, the evidence must show that a "reasonable person, knowing all the circumstances, would harbor doubts about [the judge's] impartiality. Rutland v. Pridgeon, 493 so.2d 952, 954 (Miss. 1986). In the present case, the evidence fails to overcome the presumption that the trial judge was both qualified and unbiased."

It is clear that a defendant is entitled to a fair trial before a tribunal which is free of bias and partiality. *In re Murchison*, 349 U.S. 133, 136-7, 75 S.Ct. 623, 99 L.Ed 942 (1955)., *Berger v. United States*, 255 U.S. 22, 35-6, 41 S. Ct. 230, 65 L. Ed. 481 (1921). The Eighth Circuit has indicated that a judge who has made up his mind prior to trial violates

the due process rights of the litigants. *Gardiner v. A. H. Robbins Co., Inc.*, 747 F.2d 1180, 1192 (8th Cir. 1984). The 8th Circuit is apparently applying the *Litely v. United States*, 510 U.S. 540, 555, 114 S.Ct.1147, 127 L. Ed. 2d 474 (1994) to prejudice or bias which occurs in the current judicial proceeding without specifically applying the standard to bias or prejudice from prior proceedings. *U.S. v. Larson*, 110 F.3d 620, 628 (8th Cir. 1997); *U.S. v. Jenkins*, 141 F.3d 850, 852 (8th Cir. 1998).

The 5th Circuit Court of Appeals has applied the *Litely* analysis of raising the "impossibility of fair judgment standard" only to cases involving bias gained within the judicial arena and not to bias outside the judicial arena. *U.S. v. Jordan*, 49 F. 3d 152, 155-7 (5th Cir. 1995). The 5th Circuit Court of Appeals has addressed the difference between the Due Process Clause and 28 U.S.C. § 455(a) and found that the Due Process Clause retains the test of recusal if a reasonable judge would find it necessary to recuse himself while §455(a) requires the lesser test of a reasonable person. *U.S. v. Couch*, 896 F.2d 78, 81-2 (5th Cir. 1990). The 5th Circuit Court of Appeals has held in a case somewhat analogous to the situation in this case that a judge who didn't allow a plea agreement to go forward because he believed the punishment would not satisfy U.S.S.G. § 6B1.2(a) and Fed. R.Civ. P. 11(e) and that had applied an upward departure during that first trial was not barred from sitting as judge due to no finding of such "deep-seated animosity towards Mizell (defendant) so as to render his fair judgment impossible upon her retrial. *U.S. v. Mizell*, 88 F. 3d 288, 299-300 (5th Cir. 1996).

The 6th Circuit Court of Appeals has likewise limited §455 arguments application of *Litely v. United States* to cases

in which the source of the bias is within the Court proceedings and not from outside sources. *In re Adams*, 31 F. 3d 389, 396 (6th Cir. 1994).

The 8th Circuit Court of Appeals has stated that there is a presumption of impartiality which the party seeking recusal "bears the substantial burden of proving otherwise". *Bannister v. Delo*, 100 F.3d 610, 614 (8th Cir. 1996) citing *Pope v. Federal Express Corp.*, 974 F.2d 982, 985 (8th Cir. 1992). All Circuits agree the decision to recuse is reviewed on an abuse of discretion standard. *In re Adams*, at 396.

Mississippi has consistently applied a standard that there is a presumption that the judge is unbiased which must be overcome to a reasonable doubt as to the partiality. *Hunter v. State*, 684 So. 2d 625, 630 (Miss. 1996); *Banana v. State*, 635 So.2d 851, 853 (Miss. 1994). In Mississippi, the reviewing standard is a manifest abuse of discretion. *Hunter* at 630. The test for a judge based on due process is whether a judge with knowledge of the facts which the judge had would recuse himself and was not applied by the Mississippi Court of Appeals in this Case with extrajudicial source of bias and judicial source of bias.

That Court applied the wrong standard despite the fact that the judge was sitting as trier of fact not just trier of law, and the Defendant did not stipulate to the facts alleged against him until after the state had put on seven (7) pages of proof.

ISSUE III

Did the Court of Appeals err in finding that double jeopardy did not bar the second prosecution as jeopardy had

not attached in a plea situation when the Circuits differ as to attachment and this Court has not definitely spoken on the issue.

> Holding...
> ***"Gilder's double jeopardy argument fails because although the plea hearing had begun, no plea had been taken when the mistake in the indictment was discovered and the state moved to dismiss.***
> ***"Jeopardy attaches with the acceptance of a guilty plea."*** ***United States v. Sanchez, 609 F. 2d 761, 762.....***

This Honorable Court has held *"we may assume that jeopardy attached at least when respondent was sentenced...on his plea of guilty"*. Ricketts v. Adamson, 483 U.S. 1, 8, 107 S. Ct. 2680, 976 Ed. 2d 1 (1987). Further, this Court has stated that jeopardy attaches when there is *"risk of a determination of guilt"*. Serfass v. United States, 420 U.S. 377, 391, 95 S. Ct. 1055, 43 L. Ed. 2d 265 (1975).

The 5th, 6th, 8th, and 9th Circuits have all held that jeopardy attaches upon acceptance of the plea of guilty by the Court. U.S. v. Kim , 884 F. 2d 189, 191 (5th Cir. 1989); U.S. v. Ursery, 59 F. 3d 568, 572, (6th Cir. 1995); U.S. v. Bullock, 579 F. 2d 1116, 1118 (8th Cir. 1978); United States v. Smith, 912 F. 2d 322, 324 (9th Cir. 1990). The 10th Circuit had held that jeopardy doesn't attach upon acceptance of a guilty plea but only attaches upon sentencing and entry of judgment. United States v. Combs, 634 F. 2d 1295, 1298 (10th Cir. 1980). cert denied 451 U.S. 913, 101 S. Ct. 1987, 68 L. Ed. 2d 304 (1981).

The Mississippi Court of Appeals simply applied the

5th Circuit standard without examining in state procedures to determine when jeopardy attached in state. At least one circuit court of appeals while finding in a federal context jeopardy attached at acceptance of the plea has examined state procedure, examining at Kentucky law, to determine when jeopardy attached pursuant to that law. *Loswell v. Frey*, 45 F.3d 1011, 1015 (6th Cir. 1995).

In this case, the Court should have examined jeopardy in light of Mississippi Rules and Procedures as opposed to blankedly following a 5th Circuit Court of Appeals decision. A defendant may only withdraw from a plea for good cause. Rule 8.04(6) Uniform Circuit and County Court Rules. And the plea is admissible against this defendant in the subsequent action since he did not withdraw the plea. Rule 8.04(7) Uniform Circuit and County Court Rules. Further, the case law in Mississippi has found as a matter of law detrimental reliance on a plea bargain to occur at entry of the plea. *Bell v. State*, 678 So. 2d 994 (Miss. 1996), *Singleton v. State*, 618, So.2d 1290 (Miss. 1993). Further, the State after detrimental reliance is bound to the plea bargain. *Allen v. State*, 465 So. 2d 1088, 1090-1 (Miss. 1985).

The Court needs to address the issue of when jeopardy attaches for double jeopardy purposes in a plea bargaining context federally and specifically as to the states.

ISSUE IV

Did the Mississippi Court of Appeals fail to apply a proper standard for same offense in a double jeopardy setting.

Holding.....

"First the crime was not the same."

The double jeopardy provision of both the Mississippi and United States Constitution forbids multiple punishments for the same offense. *Stewart v. State*, 662 So.2d 552, 561 (Miss. 1995). Clearly, the two statutes under which gilder was charged to not constitute the same offense. The crime of gratification of lust under §97-5-23 require proof of penetration, whereas the crime of sexual battery under §97-39-5 explicitly includes sexual penetration as an element of the crime. These are not the same crimes, therefore, there is no double jeopardy issues here.

This court has stated pursuant to *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 2d 306 (1932), the same element test is:

> *"Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not."*

Clearly, the fact that M.C.A. §97-3-95 requires proof of penetration while §97-5-23 does not require penetration does not in and of itself support the Mississippi Court of Appeals finding as both statutes must require an additional element not just one. This is true even if the law as set forth by this Court regarding same proof of facts in *Illinois v. Vitale*, 447 U.S. 410, 100 S. Ct. 2260, 65 L. Ed. 2d 228 (1980); *Grady v. Corbin*, 110 S. Ct. 2084, 109 L. Ed. 2d 548 (1990) were not to apply. The same facts were used in each case to prove the crime and would clearly satisfy the tests in *Vitale* and *Grady*.

Clearly, the Mississippi Court of Appeals has failed to apply the law as set forth by this Court as regards the same offense language of Double Jeopardy.

Respectfully submitted,

ORIGINAL SIGNED BY
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APP. 1

IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI

NO. 96-KA-00119 COA

GATLIN GILDER A/K/A GATLIN GLADNEY GILDER, JR. A/K/A GATLIN GLADNEY GILDER **APPELLANT**

V.

STATE OF MISSISSIPPI **APPELLEE**

CONSOLIDATED WITH
NO. 96-KA-00131 COA

1983 FORD PICK-UP TRUCK VIN#1FTC10Y3DLA05575; REAL PROPERTY LOCATED AT 7653 CHERRY VALLEY, LOT 2671, SOUTHAVEN WEST SUBDIVISION, SOUTHAVEN, MISSISSIPPI; KROGER RETIREMENT FUND AND THE KROGER 401K FUNDS; THE NATIONAL GUARD RETIREMENT ACCOUNT; AND 1992 CHEVROLET SILVERADO **APPELLANT**

V.

STATE OF MISSISSIPPI **APPELLEE**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

DATE OF JUDGMENT:	01/26/96
TRIAL JUDGE:	HON. GEORGE B. READY
COURT FROM WHICH APPEALED:	DESOTO COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	ROBERT G. GILDER
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: PAT FLYNN
DISTRICT ATTORNEY:	ROBERT KELLY
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION	CTS 1 THRU 12 SEXUAL BATTERY: CTS I & 2 30 YRS EACH COUNT; CTS 3 THRU 12 10 YRS EACH COUNT WITH 10 YRS SUSPENDED; ALL COUNTS RUN CONSECUTIVELY; NOT ELIGIBLE FOR RELEASE UNTIL HIS 73RD BIRTHDAY
DISPOSITION:	AFFIRMED— 11/4/97

MOTION FOR REHEARING FILED:
CERTIORARI FILED:
MANDATE ISSUED:

BEFORE THOMAS, P.J., DIAZ, AND KING, JJ.

DIAZ J., FOR THE COURT:

APP. 3

Gatlin Gilder was convicted of twelve counts of sexual battery for having a long-term sexual relationship with his teen-age stepdaughter. He makes the following arguments on appeal: (1) that Miss. Code Ann. § *97-3-95* is unconstitutionally vague, (2) that his prosecution should have been barred by double jeopardy, and (3) that his sentencing violated his federal and state constitutional rights to due process and equal protection as well as his right to be free from cruel and unusual punishment. Finding his arguments without merit, we affirm.

FACTS

Gatlin Gilder admitted to having a long-term sexual relationship with his stepdaughter, who was seventeen years of age at the time of trial. By clerical error, he was initially indicted under Miss. Code Ann. § *97-5-23* (the gratification of lust statute which carries a maximum penalty of one thousand dollars ($1,000) and ten (10) years in prison), instead of Miss. Code Ann. § *97-3-95* (the sexual battery statute which carries a maximum penalty of thirty (30) years in prison). Gilder was in the process of entering a plea of guilty to four of the initial twelve counts when the error was discovered. Prior to any plea being taken, the State moved the trial court to dismiss the indictment so that Gilder could be re-indicted under the correct statute. The trial court agreed to terminate the proceedings in order to give the State an opportunity to make the appropriate changes. After being re-indicted under § *97-3-95*, Gilder decided not to enter a guilty plea. Instead, he asked for a bench trial with stipulated facts in order to leave open the avenue of direct appeal.

DISCUSSION

I. Is Miss. Code Ann. § 9 7-3-95 unconstitutionally vague?

Mississippi's sexual battery statute provides in part: "A person is guilty of sexual battery if he or she engages in sexual penetration with a child of fourteen (14) but less than eighteen (18) years if the person is *in a position of trust or authority* over the child including without limitation the child's ... *stepparent.*" Miss. Code Ann. § 97-3-95 (2) (Rev. 1994) (emphasis added). Gilder argues that the phrase "in a position of trust or authority" is unconstitutionally vague. He maintains that the statute does not define what constitutes "a position of trust or authority" but rather attempts to set out certain examples without limitation. A criminal statute is unconstitutionally vague if it fails to inform those subject to it what acts the statute prohibits. *Cassibry v. State*, 404 So. 2d 1360, 13 67-68 (Miss. 1981). The test, according to the United States Supreme Court, is "whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *Jordan v. DeGeorge*, 341 U.S. 223, 231-32 (1951). "Although a statute imposing criminal penalties must be strictly construed in favor of the accused, it should not be so strict as to override common sense or statutory purpose." *Reining v. State*, 606 So. 2d 1098, 1103 (Miss. 1992). Mississippi's sexual battery statute specifically prohibits sexual penetration of a person seventeen (17) years old by a stepparent. Miss. Code Ann. § 97-3-95(2) (Rev. 1994). In the present case, there is little doubt that the applicable statute provides adequate warning as to *the* type of conduct which it prohibits.

Gilder further maintains that § 97-3-95 treats people differently based upon their relationship to the parent of the

minor, which he claims is in direct violation of his right to equal protection. He argues that the statute, by allowing children between the ages of fourteen (14) and eighteen (18) to consent to sexual relations with a person not in a position of trust or authority under § *97-3-95* (1) *while* prohibiting sexual relations between the child and a person in a "position of trust or authority" under § *97-3-95* (2), takes away the defense of consent from one class of defendants when it is allowed for another class for the same offense. "[I]f a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end." *Romer v. Evans* 116 S. Ct. 1620, 1627 (1996). Clearly, the added protection for minors from adults who are in a "position of trust or authority" is a necessary distinction which bears a rational relation to a legitimate end. Accordingly, we find that Gilder□s first assignment of error is without merit.

2. Should Gilder's prosecution have been barred by double jeopardy ?

Gilder next argues that his constitutional right to be free from double jeopardy was violated when the trial court allowed the State to dismiss the first set of charges against him after the plea hearing had begun and re-indict him under another statute. Gilder acknowledges that Article 3, Section 22 of the Mississippi Constitution requires either an acquittal or conviction of an offense before a prosecution for the same offense at a second proceeding constitutes double jeopardy. However, he argues that the double jeopardy provision of the Mississippi Constitution is more restrictive than that of the United States Constitution, and under such circumstances, the United States Constitution controls through the authority of the Fourteenth Amendment. Gilder's argument fails for

two reasons.

First, the crime was not the same. The double jeopardy provision of both the Mississippi and United States Constitutions forbids multiple punishments for the *same* offense. *Stewart v. State*, 662 So. 2d *552*, 561 (Miss. 1995). Clearly, the two statutes under which Gilder was charged do not constitute the same offense. The crime of gratification of lust under § *97-5-23* does not require proof *of penetration*, whereas the crime of sexual battery under § 97-3-95 explicitly includes sexual penetration as an element of the crime. These are not the same crimes; therefore, there is no double jeopardy issue here. Second, Gilder□s double jeopardy argument fails because although the plea hearing had begun, no plea had been taken when the mistake in the indictment was discovered and the State moved to dismiss. "Jeopardy attaches with the acceptance of a guilty plea." *United States v. Sanchez*, 609 F.2d 761, 762 (5th Cir. 1980). Accordingly, we find that the trial judge acted within the bounds of his discretion in terminating the proceedings. There is simply no double jeopardy problem here.

3. Did Gilder's sentencing violate his federal and state constitutional rights to due process and equal protection as well as his right to be free from cruel and unusual punishment ?

Gilder argues that since the trial judge was one of the main authors of § *97-3-95*, that he should have disqualified himself when he became aware that Gilder was being charged under that statute. He claims that the sentence he was given exceeded most sentences imposed for rape, armed robbery, and murder, and that therefore his constitutional rights to due process and equal protection as well as his right to be free

from cruel and unusual punishment were violated. Canon 3C (1) of the Code of Judicial Conduct mandates that a judge "should disqualify himself from a proceeding in which his impartiality might reasonably be questioned. . . ." This Court presumes that a judge is "qualified and unbiased." *Banana v. State*, 635 So. 2d 851, 853 (Miss. 1994). In order to overcome the presumption, the evidence must show that a "reasonable person, knowing all the circumstances, would harbor doubts about [the judge's] impartiality." *Rutland v. Pridgen*, 493 So. 2d 952, 954 (Miss. 1986). In the present case, the evidence fails to overcome the presumption that the trial judge was both qualified and unbiased.

Gilder further argues that the sentence imposed by the trial judge was so disproportionate to the penalty imposed in similar cases, that his constitutional right to be free from cruel and unusual punishment, as guaranteed by the Eighth Amendment to the United States Constitution and by Article 3, Section 28 of the Mississippi Constitution, was violated. The supreme court has stated that "[s]entencing is within the complete discretion of the trial court and not subject to appellate review if it is within the limits prescribed by statute." *Hoops v. State*, 681 So. 2d 521, 537 (Miss. 1996). Gilder was indicted and found guilty on twelve separate counts of sexual battery. The maximum sentence for each of the counts, under § 97-3-101—the penalty statute for a § 97-3-95 sexual battery offense—is thirty years. The trial court gave Gilder the maximum thirty year sentence on two counts and a ten year sentence on each of the remaining ten counts. This was within the statutory limits and should not be disturbed on appeal. Accordingly, we find that the trial judge was well within his discretion and that Gilder□s constitutional rights were not violated.

THE JUDGMENT OF THE CIRCUIT COURT OF DESOTO COUNTY OF SEXUAL BATTERY AND SENTENCE TO THIRTY YEARS EACH ON COUNTS I AND II AND TEN YEARS EACH ON COUNTS III THROUGH XII WITH TEN YEARS SUSPENDED ON EACH COUNT IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. SENTENCES IMPOSED SHALL RUN CONSECUTIVELY TO ANY AND ALL SENTENCES PREVIOUSLY IMPOSED. THE FORFEITURE OF PROPERTY OF GILDER IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.

BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, HERRING, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR

IN THE CIRCUIT COURT OF
DESOTO COUNTY, MISSISSIPPI
FOR THE SEVENTEENTH JUDICIAL DISTRICT

STATE OF MISSISSIPPI

VS. **CAUSE NUMBER CR95-84RD**

GATLIN GILDER, JR.

ORDER TO REMAND

This cause having come on for hearing on the motion of the State that this cause be remanded to the files, and the Court having considered same finds the motion is well taken and should be sustained.

IT IS THEREFORE ORDERED that the above styled and numbered cause to this Defendant be and the same is hereby remanded to the files. The Defendant does not agree to pay all court costs.

SO ORDERED this the 11th day of September, 1995.

GEORGE B. READY
CIRCUIT COURT JUDGE

ROBERT J. KELLY
ATTORNEY FOR THE STATE
STATE BAR NUMBER #3559

ATTORNEY FOR DEFENDANT
STATE BAR NUMBER

IN THE CIRCUIT COURT OF
DESOTO COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI

VS. **CAUSE NO. CR95-0306-R-D**

GATLIN GILDER

ORDER OF FORFEITURE OF PROPERTY AND SEIZURE OF ASSETS

The Defendant, Gatlin Gilder, being duly tried and convicted of the violation of Miss. CODE ANN. §97-3-95(2), this Court, pursuant to Miss. CODE ANN. §§ 99-37-3 and 99-37-5, finds that due to the criminal activity of the Defendant, Gatlin Gilder, the following listed property of the Defendant is ORDERED forfeited and seized as restitution for Melanie Bowen, the victim of the Defendant□s criminal activity:

1. Any interest of the Defendant, Gatlin Gilder, in the real property located at 7653 Cherry Valley, Lot 2671, Southaven West Subdivision, Southaven, Mississippi 38671.

2. Any retirement plan, 401k plan, pension, or benefits that the Defendant, Gatlin Gilder, may be entitled to pursuant to his employment with Kroger.

3. Any retirement plan, 401k plan, pension, or benefits that the Defendant, Gatlin Gilder, may be entitled to pursuant to his enlistment in the Mississippi National Guard.

IT IS FURTHER ORDERED that upon seizure the property and/or assets shall become the property of W.E. Davis, DeSoto County Chancery Clerk, who is appointed Guardian of Melanie Bowen, who shall hold said property for the benefit of Melanie Bowen.

THE COURT FURTHER ORDERS that Paul R. Scott be appointed attorney for the Guardian and estate of Melanie Bowen, and that he shall immediately file all documentation, liens,
notice, etc., as shall be necessary, with any and all parties holding any of the above listed property and/or assets of the Defendant, Gatlin Gilder, in order to seize and protect the above listed property and/or assets for the benefit of Melanie Bowen, until further order of the Court.

SO **ORDERED** this the 24th day of January, 1996.

GEORGE B. READY
CIRCUIT COURT JUDGE

IN THE CIRCUIT COURT OF DESOTO COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI

vs. **CAUSE NO. CR 95-306-R(D)**

GATLIN GILDER
W/M DOB 9/03/42
SSN 427-82-7412

SENTENCE OF THE COURT

THIS DAY into open Court came the District Attorney who prosecutes for the State of Mississippi, and came also the Defendant, **GATLIN GILDER,** in his own person and represented by counsel, Robert G. Gilder, said Defendant having been lawfully arraigned upon an Indictment lawfully returned charging said Defendant with the crimes of **twelve (12)** counts of Sexual Battery.

IT IS, THEREFORE, ORDERED by this Court that for said offenses that the said Defendant, **GATLIN GILDER,** be and is hereby sentenced to serve as follows: In Count 1, a term of **thirty (30)** years in the Mississippi Department of Corrections; in Count 2, a term of thirty (30) years in the Mississippi Department of Corrections, said sentence to run consecutive to the sentence imposed in Count 1; in Count 3, a term of **ten (10)** years in the Mississippi Department of Corrections, with these ten (10) years suspended pending the Defendant's future good behavior, said sentence to run consecutive to the sentence imposed in Count 2; in Count 4, a term of ten (10) years in the Mississippi Department of Corrections, with these ten **(10)**

years suspended pending the Defendant's future good behavior, said sentence to run consecutive to the sentence imposed in Count 3; in Count 5, a term of ten (10) years in the Mississippi Department of Corrections, with these ten (10) years suspended pending the Defendant's future good behavior, said sentence to run consecutive to the sentence imposed in Count 4; in Count 6, a term of ten (10) years in the Mississippi Department of Corrections, with these ten (10) years suspended pending the Defendant□s future good behavior, said sentence to run consecutive to the sentence imposed in Count 5; in Count 7, a term of ten (10) years in the Mississippi Department of Corrections, with these ten (10) years suspended pending the Defendant's future good behavior, said sentence to run consecutive to the sentence imposed in Count 6; in Count 8, a term of ten (10) years in the Mississippi Department of Corrections, with these ten (10) years suspended pending the Defendant's future good behavior, said sentence to run consecutive to the sentence imposed in Count 7; in Count 9, a term of ten (10) years in the Mississippi Department of Corrections, with these ten (10) years suspended pending the Defendant's future good behavior, said sentence to run consecutive to the sentence imposed in Count 8; in Count 10, a term of ten (10) years in the Mississippi Department of Corrections, with these ten (10) years suspended pending the Defendant's future good behavior, said sentence to run consecutive to the sentence imposed in Count 9; in Count 11, a term of ten **(10)** years in the Mississippi Department of Corrections, with these **ten (10)** years suspended pending the Defendant's future good behavior, said sentence to run consecutive to the sentence imposed in Count 10; and in Count 12, a term of ten (10) years in the Mississippi Department of Corrections, with these ten (10) years suspended pending the Defendant's future good behavior, said sentence to run consecutive to the

sentence imposed in Count 11.

It is the intention of this Court that the Defendant not be eligible for release until he has obtained his seventy-third (73rd) birthday.

The Court further finds this Defendant to be a special danger to children under eighteen (18) years of age. Accordingly, the appeal bond is set in the amount of $500,000.00.

There will be a supplemental Sentencing Order to include restitution to the victim pursuant to Section 99—37—1, et. seq.

Defendant is hereby remanded into the custody of the Sheriff of DeSoto County, Mississippi, to await transportation to the Mississippi Department of Corrections.

SO ORDERED this the 26 day of January, 1996.

GEORGE BANKS READY
CIRCUIT COURT JUDGE

IN THE CIRCUIT COURT OF
DESOTO COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI

vs **CAUSE NUMBER CR95-306RD**

GATLIN GILDER

SUPPLEMENTAL SENTENCING ORDER AS TO RESTITUTION

Comes now the Court pursuant to its previous Sentencing Order in the above referenced cause and enters this Supplemental Order pursuant to Section 99-37-3 which empowers this Court to order restitution to the victim for crimes committed against their person.

The Defendant Gatlin Gilder having affirmed in open court that he was notified that restitution under Section 99-37—3 would be a consideration of the Court and that he did not object to the seizing and forfeiture of any assets which he owned to the benefit of the victim, and the Court having considered all the evidence does hereby find as follows:

That the house owned by the Defendant at 7653 Cherry Valley, Southaven, Mississippi, will be seized and forfeited to the benefit of the victim, Melanie Bowen. The Defendant shall execute a Quit Claim Deed to W. E. Davis, Chancery Clerk of DeSoto County, as Guardian of Melanie Bowen to be held in trust for Melanie Bowen until she reaches the age of twenty five years when title to said house shall vest in her in fee simple, unless previously sold by the

Guardian to pay for the minor□s educational expenses. Melanie Bowen and her mother will be allowed to use the house as their residence unless and until the Guardian determines that in order to pay for the minor□s education the house must be sold and the benefits used for that purpose.

The Defendant□s 1983 Ford pick up truck will be seized and sold and the funds paid over to the Guardianship for the minor victim.

The 1992 Chevrolet Silverado will be immediately transferred to the minor, Melanie Bowen for her personal use.

The Kroger Retirement Fund and the Kroger 401K Fund will all be seized and forfeited to and for the benefit of the minor victim, Melanie Bowen. All funds derived from these accounts will likewise be paid into the Guardianship of Melanie Bowen.

The National Guard Retirement Account shall be seized and forfeited to and for the benefit of the minor, Melanie Bowen. However, Ms. Bowen shall only receive monthly payments from this fund until the Defendant, Gatlin Gilder is released from prison. Upon the release of the Defendant from prison any monthly benefit retirement payments available from this National Guard Retirement shall then go to the Defendant. If the Defendant dies before his release from prison, any lump sum payments due from the fund shall be made to the Guardianship of Melanie Bowen if it still exists or shall be paid directly to her if she has reached the age of twenty five years.

The forfeiture of the Kroger Retirement Account, the

Kroger 401K Account and the National Guard Retirement Account are all being Ordered as the result of the criminal activity of the Defendant and therefore should be surrendered by all appropriate entities and organizations to and for the benefit of the minor, Melanie Bowen. However, if any of these particular assets cannot be seized because of other governmental regulations, then the first day that said funds become available they shall be seized and turned over either to the Guardianship Account, if it still exists, or directly to the victim if she has reached the age of twenty five. Application shall be made by the Guardian for complete seizure of these funds or for early payments for the benefit of the minor and said application shall be considered by the appropriate entity as an application by the Defendant just as if, under the law, the Defendant had made the application himself. The Victim will stand in the place and stead of the Defendant for future payments if all or part of said funds cannot be immediately seized because of any other governmental regulations.

The Chancery Clerk of DeSoto County, W. E. Davis, shall be and is hereby appointed Guardian of the person and the estate of Melanie Bowen. He shall be required to follow all standard procedures just as if this Guardianship had been set up by an order of the Chancery Court of DeSoto County. All bonds and accounting are hereby waived. Honorable Paul R. Scott, is appointed to represent the Guardian and the minor, Melanie Bowen, in any and all civil actions and proceedings necessary to pursue and seize said assets. Said Guardianship shall continue in existence until the minor, Melanie Bowen, reaches the age of twenty five years at which time said Guardianship shall cease and all assets of the Guardianship shall be surrendered to her and shall vest in her in fee simple.

The Defendant shall be required to give all assistance to the Guardian and his legal representative in pursuit of these assets. Failure of the Defendant to fully cooperate in the seizure, accumulation and transfer of these assets shall subject him to the penalties available to the Court in Section 99-37-5.

SO ORDERED this the 6th day of February, 1996.

GEORGE B. READY
CIRCUIT COURT JUDGE

IN THE CIRCUIT COURT OF
DESOTO COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI

vs **CAUSE NUMBER CR95-306RD**

GATLIN GILDER

NUNC PRO TUNC CORRECTED
SENTENCING ORDER

THIS DAY into open Court came the District Attorney who prosecutes for the State of Mississippi, and came also the Defendant, Gatlin Gilder, in his own person and represented by counsel, Robert G. Gilder, said Defendant having been lawfully arraigned upon an Indictment lawfully returned charging said Defendant with the crimes of twelve (12) counts of Sexual Battery.

The Defendant having waived Jury Trial and the Court sitting as trier of fact and the Court after having heard all evidence and argument cf Counsel, found the Defendant, Gatlin Gilder, guilty of all twelve (12) counts of Sexual Battery beyond reasonable doubt.

IT IS THEREFORE ORDERED by this Court that for said offenses that the said Defendant, Gatlin Gilder, be and is hereby sentenced to serve as follows: In Count 1, a term of thirty (30) years in the Mississippi Department of Corrections; in Count 2, a term of thirty (30) ***years*** in the Mississippi Department of Corrections, said sentence to run consecutive to the sentence imposed in Count 1; in Count 3, a

term of ten (10) years in the Mississippi Department of Corrections ten (10) years suspended pending the Defendant□s future good behavior, said sentence to run consecutive to the sentence imposed in Count 2; in Count 4, a term of ten (10) years in the Mississippi Department of Corrections, with these ten (10) years suspended pending the Defendant□s future good behavior, said sentence to run consecutive to the sentence imposed in Count 3; in Count 5, a term of ten (10) years in the Mississippi Department of Corrections, with these ten (10) years suspended pending the Defendant□s future good behavior, said sentence to run consecutive to the sentence imposed in Count 4; in Count 6, a term of ten (10) years in the Mississippi Department of Corrections, with these ten (10) years suspended pending the Defendant□s future good behavior, said sentence to run consecutive to the sentence imposed in Count 5; in Count 7, a term of ten (10) years in the Mississippi Department of Corrections, with these ten (10) years suspended pending the Defendant□s future good behavior, said sentence to run consecutive to the sentence imposed in Count 6; in Count 8, a term of ten (10) years in the Mississippi Department of Corrections, with these ten (10) years suspended pending the Defendant□s future good behavior, said sentence to run consecutive to the sentence imposed in Count 7; in Count 9, a term of ten (10) years in the Mississippi Department of Corrections, with these ten (10) years suspended pending the Defendant□s future good behavior, said sentence to run consecutive to the sentence imposed in Count 8; in Count 10, a term of ten (10) years in the Mississippi Department of Corrections, with these ten (10) years suspended pending the Defendant□s future good behavior, said sentence to run consecutive to the sentence imposed in Count 9; in Count 11, a term of ten (10) years in the Mississippi Department of Corrections, with these ten (10) years suspended pending the

Defendant□s future good behavior, said sentence to run consecutive to the sentence imposed in Count 10; in Count 12, a term of ten (10) years in the Mississippi Department of Corrections, with these ten (10) years suspended pending the Defendant□s future good behavior, said sentence to run consecutive to the sentence imposed in Count 11.

It is the intention of this Court that the Defendant not be eligible for release until he has obtained his seventy-third (73) birthday.

The court further finds this Defendant to be a special danger to children under eighteen (18) years of age. Accordingly, the appeal bond is set in the amount of $500,000.00.

The Defendant is hereby remanded into the custody of the Sheriff of DeSoto County, Mississippi, to await transportation to the Mississippi Department of Corrections.

This Order is being entered this day to correctly reflect that which is actually in the record. This Order in no way effects the Supplemental Sentencing Order concerning Restitution previously entered by the Court.

SO ORDERED this the 26th day of January, 1996, and entered ***NUNC PRO TUNC*** this the 19th day of March 1996.

GEORGE B. READY
CIRCUIT COURT JUDGE

IN THE COURT OF APPEALS
OF THE STATE OF MISSISSIPPI
NO. 96-KA-00119 COA

GATLIN GLADNEY GILDER A/K/A GATLIN GLADNEY GILDER, JR. A/K/A GATLIN GLADNEY GILDER **APPELLANT**

VS.

STATE OF MISSISSIPPI, **APPELLEE**

CONSOLIDATED WITH
NO. 96-KA-00131 COA

1983 FORD PICK-UP TRUCK VIN#1FTCF10Y3DLA05575 REAL PROPERTY LOCATED AT 7653 CHERRY VALLEY, LOT 2671, SOUTHAVEN WEST SUBDIVISION, SOUTHAVEN. MISSISSIPPI; KROGER RETIREMENT FUND AND THE KROGER 401K FUNDS; THE NATIONAL GUARD RETIREMENT ACCOUNT; AND 1992 CHEVROLET SILVERADO **APPELLANTS**

V.

STATE OF MISSISSIPPI **APPELLEE**

ORDER

This matter is before the Court on the Appellant□s motion for rehearing. After careful and thorough consideration, the Court finds that the motion should be denied.

THEREFORE, IT IS ORDERED that the Appellant□s motion for rehearing be, and hereby is, denied.

SO ORDERED, this the 19th day of December 1997.

JAMES E. THOMAS, PRESIDING JUDGE
FOR THE COURT

IN THE SUPREME COURT OF MISSISSIPPI

NO. 96-CT-00119-SCT

GATLIN GILDER A/K/A GATLIN GLADNEY GILDER, JR. A/K/A GATLIN GLADNEY GILDER
Appellant

V.

STATE OF MISSISSIPPI
Appellee

CONSOLIDATED WITH:

NO. 96-CT-00131-SCT

1983 FORD PICK-UP TRUCK VIN#1FTCF1OY3DLAO5575; REAL PROPERTY LOCATED AT 7653 CHERRY VALLEY, LOT 2671, SOUTHAVEN WEST SUBDIVISION, SOUTHAVEN, MISSISSIPPI; KROGER RETIREMENT FUND AND THE KROGER 401K FUNDS; THE NATIONAL GUARD RETIREMENT ACCOUNT; AND 1992 CHEVROLET SILVERADO
Appellants

V.

STATE OF MISSISSIPPI,
Appellee

ORDER

This matter comes before the Court on the Petition for Writ of Certiorari filed by the Appellants. After due consideration, the Court finds that the petition is not well taken and shouldbe denied.

IT IS THEREFORE ORDERED that the Petition for Writ of Certiorari filed by the Appellants be, and hereby is, denied.

SO ORDERED, this, the 2nd day of April, 1998.

LENORE L. PRATHER, CHIEF JUSTICE
FOR THE COURT

TO DENY: PRATHER, C.J., SULLIVAN AND PITTMAN, P.JJ., BANKS, ROBERTS, SMITH, MILLS AND WALLER, JJ.
TO GRANT: MCRAE. J.